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SUBJECT: U.S.-THAILAND FTA: GOOD PROSPECTS FOR PROGRESS IN NOVEMBER NEGOTIATING ROUND

Classified By: Economic Counselor Michael J. Delaney, for Reasons 1.4 (b) and (d)

**¶11. (C)** Summary: On the eve of the Round 6 FTA talks in London, prospects look good for making solid progress in most negotiating areas scheduled for discussion. There are signs that the mood here has shifted from passive resistance to a resigned, "let's get on with it" attitude. Even in financial services, the RTG is publicly stating that liberalization is coming. Many of the most knowledgeable observers here point out that the support of PM Thaksin has not flagged, and that his clout alone ensures that the FTA will be completed. The personal involvement of PM Thaksin probably is a negative, however, in the area of temporary entry: RTG insistence on some treatment of this issue reportedly comes directly from the PM, who is mindful of the temporary entry provisions in Singapore's FTA with the U.S.

**¶12. (C)** The RTG is billing the FTA here in Thailand as not an FTA at all, but as an economic cooperation agreement with the U.S. At the heart of this marketing strategy is a strong, more or less across the board trade capacity building effort as an integral part of the FTA process. For that reason, a continuation of the strong U.S. effort in this area is a crucial ingredient for rapid FTA progress.

**¶13. (C)** Paras 10-35 provide our assessment of the state of play in many of the negotiating areas. End Summary

Things Look Mostly Good for Progress in London

**¶14. (C)** Based on our talks with a broad range of Thais involved in one way or another with the FTA talks, we are hopeful that good progress can be made in most of the negotiating areas. There is definitely a change in the mood here -- a shift from the old "I don't see how we can possibly meet the Americans' demands", to a "let's get on with it" attitude. While the new mood is more akin to resignation than enthusiasm, it nevertheless represents an improvement that, we hope, will be felt in London.

**¶15. (C)** There are several reasons for the mood shift here. The RTG's senior negotiator, Ambassador Nitya, told us that a certain amount of preliminary "dancing around" was necessary for the real talks to begin. "The first four rounds were discussions, really, just a way of getting acquainted," he said. (At this point, Nitya broke into a rendition of "Getting to Know You," appropriately, from the movie The King and I). Now, Nitya said, real negotiations can begin. Other developments that have contributed include Prime Minister Thaksin's September 19 meeting with the President, in which both affirmed the desire to finish talks by early 2006; and the completion of internal RTG sectoral studies that paint a generally benign picture of the likely effects of the FTA on the Thai economy. Finally, in many negotiating areas, Thai officials have gotten the measure of their American counterparts and now possess the self-confidence to move forward.

**¶16. (C)** Most of our contacts believe that PM Thaksin's commitment to successfully concluding an FTA with the U.S. is genuine and has not flagged. Said one of our sources, "Thaksin is loathed by the old-line, elite industrialists, who see him as a low-class upstart. That is one reason Thaksin has no real problem opening up the markets via the FTA -- he has no desire to protect his enemies from competition." And, given Thaksin's continued grip on power, most observers here are convinced that he has the clout to overcome opposition to the FTA. According to one observer, "You guys (the USG) worry too much -- the FTA will be done because Thaksin said it would be done."

"Cooperation", Not Free Trade

**¶17. (C)** Faced with the apathy of the masses and the hostility of a few elite groups (mostly protected sectors and foreign-funded NGOs), the RTG is portraying the FTA as not an FTA at all, but rather an economic cooperation agreement (formally, perhaps the U.S.-Thailand Trade and Investment Cooperation Agreement -- USTICA). This largely explains the RTG's zeal for packing as many trade capacity building projects as possible into the FTA process. Proponents of the

theory of comparative advantage, or even believers in the "win-win" nature of open markets, are thin on the ground here, but many Thais readily recognize the advantages of cooperation with the U.S., particularly when that cooperation involves transfer of expertise from the U.S. to Thailand.

¶8. (C) The RTG's notion of the FTA being at heart a cooperation accord is linked to likely RTG market access offers. Nowhere can this be seen more clearly than in financial services. Perhaps the ultimate protectionist shibboleth in Thailand, recent signs point to a willingness to negotiate liberalization even in this area. The RTG Finance Minister recently told us that dealing with financial services in the context of the FTA is a challenge for Thailand, in part because increased international regulation and rules governing banks (e.g., Basel II) are lessening commercial banks' ability to finance long term. The RTG, he said, wants to build up Thai capital -- especially bond markets -- as vehicles to provide long term project finance. According to the Finance Minister, the biggest obstacle to further development of the Thai bond market is the lack of liquidity which leads to high volatility. Rules requiring mutual funds, pension funds, and other institutional investors to mark-to-market on a daily basis means that they are hesitant to invest in such volatile instruments. The key to FTA progress in this area, he said, lies in USG technical assistance in assisting Thailand in developing its capital markets and effectively dealing with the mark-to-market issue. The Thais are saying, in essence, "OK, you want us to liberalize in this area, then it is up to you to equip us to deal with the effects of this liberalization." While financial services is a particularly vivid example of this link between FTA progress and USG technical assistance (under the broad rubric of trade capacity building), we believe this link exists in most negotiating areas.

¶9. (C) The other advice we consistently receive is to take a lesson out of Japan's successful FTA game book. While less than comprehensive, the Japanese seem to have achieved many of their immediate goals in the FTA with Thailand. This was accomplished by orchestrating a steady parade through Bangkok of MITI types and Japanese industrialists, extolling the employment and FDI benefits of a Japan-Thailand FTA. The arguments were not at all abstract; they touted how X number of jobs and X amount of Japanese investment would come to Thailand if the event was completed. Said one insider, "This sort of thing works here. Nobody bothers to check on the accuracy of these claims post facto -- money and employment talks." The problem with this idea is that we are unaware of any U.S. firm (or the AmCham) that is prepared to make such a statement in relation to the U.S.-Thailand FTA. But we should remain alert to any emerging opportunities that may present themselves.

#### Negotiating Areas

¶10. (C) The following is our assessment of the current state of play in the various FTA negotiating groups. (NOTE: Not all of these groups are scheduled to meet in London.)

¶11. (C) Financial Services -- The RTG seems to be connecting liberalization in this area to U.S. assistance in developing Thailand's capital markets (para 8). With that proviso, there are encouraging signs that we may begin to see forward movement in London. Finance Minister Thanong seems to be preparing the Thai public and financial community for a shift from the protectionist policies that have long dominated much of the financial sector. His clearest statement that liberalization is coming (albeit after an indeterminate phase-in period) came in a November 8 speech before a group of Thai bankers in Bangkok. Thanong urged Thailand's financial institutions to prepare for "unavoidable" liberalization. He said, "In the age of financial sector liberalization, in order to be in harmony with the globalization, we cannot either reject or oppose such inflow of change. On the contrary, we must prepare to become strong enough. What I can do now is that I can only delay the timing of such a change, not allowing it (the liberalization in the financial sector) to happen before the adaptation of the country's financial institutions."

¶12. (C) The RTC probably is willing to accept relatively short phase-in periods for insurance and non-banks (perhaps even immediate liberalization), but will hold out for a long phase-in period for banks. As noted in para 8, the phase-in period is likely to be linked to the development of Thailand's capital markets. A big concern is cross-border investments. Most analysts here think that under current conditions, total liberalization would produce a one-way outflow of capital from Thailand. The hope is to phase in cross border liberalization to progressively force capital market development.

¶13. (C) This fairly rosy scenario could be upset by the Bank of Thailand, still the strongest opponent of financial services liberalization. We expect the BoT to fight banking liberalization right up to the signing of the FTA. One insider told us that the BoT Governor opposes liberalization

"because he is a Thai banker, not a central banker." Another analyst with good ties told us the BoT is planning to team up with some commercial banks and NGOs to generate large demonstrations against the FTA ("with the focus on medicine prices, GMOs, and other fear mongering issues -- the BoT realizes people won't demonstrate for banks"). Still, we understand the BoT has presented a proposed timetable for liberalized market access to RTG policymakers.

¶14. (C) Another complication in financial services is the jettisoning of the issue by Amb. Nitya. The RTG senior FTA negotiator has surrendered responsibility in this area to the Ministry of Finance. This reportedly has created logistical and coordination problems within the RTG. We understand Amb. Nitya was scheduled to meet with Finance officials (as well as former Finance Minister Somkid) on November 9 for the purpose of resolving these problems.

¶15. (C) Services -- This group is not scheduled to meet in London. Our contacts report that progress in future rounds is likely to be halting. Hindrances are legion. First, services is a highly protected sector in Thailand, with many SMEs that are thought to be incapable of surviving greater competition. Second, Thailand has not opened up this sector in previous FTAs, giving rise to the expectation that the area will again be excluded. Third, the Thais are almost entirely on the defensive in this area, with the only offensive issue being visas. Fourth, the lead Thai negotiators, especially Khun Nan, are unenthusiastic about a bilateral approach (Nan was formerly posted at the WTO, and is reportedly imbued with "the spirit of G-77"). Finally, the Thai services negotiators are also responsible for conducting trade agreements with India, Australian FTA implementation issues, and APEC/ASEAN, so they have limited time to devote to the FTA with the U.S.

¶16. (C) While no panacea, we think continuing USG offers to provide trade capacity building support for services SMEs would be helpful, as would technical assistance on standards and certification.

¶17. (C) Telecommunications -- Chirapa Chitraswang, Principal Advisor for Communications, MICT, Direk Chareonpol (MICT), and Pasu Srihirun from the National Telecommunications Commission (NTC) will attend the London talks. We are not aware of any deal-breaker issues that will be highlighted in this round. The MICT has, nevertheless, been reluctant to discuss and un-bracket the US text to date, because officials there have been waiting for the NTC to issue licenses and regulatory guidance. The NTC has been operational for only one year. When the Ambassador met with the Minister of Information and Communication Technology in October, he urged the MICT to take the lead in the interagency process on the Thai side. While we expect that the regulatory picture will be sufficiently clear for the MICT to issue policy guidelines by the anticipated January FTA round, we do not know the extent to which they are able to commit during the intersessional round. Additionally, we understand that another reason for RTG delay is that some telecom issues tie in with other chapters, such as IPR (on satellite signals, for example). The Thai telecom sector has experienced considerable upheaval the past year (see recent Embassy reporting), including the Telenor buyout of UCOM and TAC, the NTC's issuance of licenses, and the prospects for the privatization of state-owned telcos TOT and CAT Telecom.

¶18. (C) E-Commerce -- Ms. Anchalapon Siriwan, Director of the Strategy and Planning Bureau (Acting Senior Advisor on Foreign Affairs), MICT, has replaced Dr. Duangtip as the chief negotiator for the RTG. Direk Chareonpol (MICT) and Pasu Srihirun (NTC) will also attend the London round. As with telecommunications, we are not aware of any deal-breaker issues, but the MICT has been reluctant to discuss and unbracket the US text thus far. We do not have a clear understanding of what the new chief negotiator is prepared to do at the London talks.

¶19. (C) The one issue discussed among USTR, State, and the MICT since the June Montana FTA round is the matter of Lese-Majeste. The RTG has proposed to include language in the FTA to the effect that the e-commerce provisions not be read as a license to insult the king. USTR has proposed in return that the matter be dealt with in a confirmation of policy letter. State's lawyers have reviewed the draft letter prepared by USTR and find it acceptable. US negotiators should be aware, however, that the language proposed by the RTG also mentions &indecent or harmful content,<sup>8</sup> and that the government of Prime Minister Thaksin Shinawatra -- with the MICT as the lead agency -- is currently engaged in a campaign (known as Cyber Clean) to make cyberspace free from &inappropriate content.<sup>8</sup> The MICT has specified that the target is pornographic content, not political material. In this context, the MICT may oppose the side letter proposal.

¶20. (C) Labor -- Three RTG negotiations ) Deputy PermSec

Surin Chiravisit, Deputy DG Dr. Chaiyuth, and a staffer, Ms. Angkana. We understand they will be prepared to discuss removing text brackets. Among the topics proposed by DOL for discussion are: treatment of subcontract labor under Thai labor laws, treatment of migrant labor, the pending Labor Relations Act, and Thailand's proposed Special Economic Zones (SEZs) and the applicability of labor laws in the SEZs.

**¶21. (C) Textiles --** This area will not be meeting in London. The Thai side (K. Nantawan of Foreign Trade) says it has sent USTR a rules of origin proposal. They expect to discuss possibly at a future separate inter-session, or at the next FTA round in Thailand.

**¶22. (C) Customs --** Director Wattana U-Thasoothorn of the Customs Standards and Valuation Directorate will attend. Subject matter will include recent follow-up questions that USTR sent to him after receiving the questionnaire answers from Thai customs. Issues will include the advance publication of regulations, release of goods, review and appeal, carrier medium and express shipment. We are hopeful that the Thai side is prepared to discuss text.

**¶23. (C)** Based on our discussions with Wattana, we believe the RTG is prepared to agree to 99 percent of the U.S. text. According to Wattana, the U.S. text, in general, describes standard Thai practice. As in other chapters, however, the RTG is reluctant to agree to anything requiring a change in existing Thai law. Also, the RTG negotiators appear to be attempting to harmonize foreign commitments around WTO standards.

**¶24. (C) Specific areas of RTG concern are as follows:**

-- Article 1 (Publication): The RTG is prepared to comply with this item at this time so long as publication means in the Thai language. The RTG is not prepared to publish English translations of all documents. Additionally, in some cases, advance publication is difficult, although he said in the case of hearings the RTG does provide texts to interested parties in order to obtain comments. (Note: When the RTG holds hearings on pending legislation, both the process and the role of the hearings are less formalized ) and therefore transparent ) than the US negotiators may assume. They tend to be brief affairs with far less substantive comment than is standard practice in the United States).

-- Article 2 (Release of Goods): This was the subject of detailed discussion in Honolulu in September. Wattana expects that in London there will be a presentation by USTR on surety matters, and that the two sides will then review the text. While Wattana expressed a willingness to structure the discussion in article by article fashion from the text of the US proposal, he objected to structuring the discussion around the points on USTR's questionnaire. Wattana explained that Thailand has expedited processing for gold card privilege holders and licensed customs brokers. (Note: It appears that lack of knowledge of each others' systems continues to bedevil this issue. The RTG system is a much more informal one than the US. RTG negotiators do not appear to understand that Article 2 calls for release of goods within 48 hours across the board. The Thais need to grasp the comprehensive nature of this article, and in order to agree to it, there may need to be either TCB measures or a phase-in period, or both.)

-- Article 7 (Express Shipments): The RTG has difficulty accepting paragraphs (e) and (f) which specify that such shipments shall not be limited by maximum weight or customs value, and that the de minimus customs value shall be no less than US\$200. Wattana claims that these provisions were not in the FTAs with Chile, Australia, Singapore, CAFTA. Accepting the US\$200 limit will require a change in Thai law (the Tariff Act) and will be a problem when the agreement goes to cabinet. Current Thai law specifies about US\$25 (1,000 Baht).

-- Article 10 (Advance Rulings): Wattana understands that the U.S. FTA with Chile specifies a 3-year phase-in period. In principle, the RTG can implement this article at the present time, according to Wattana.

**¶25. (C) Environment --** Mr. Petipong Pungpun Na Ayudhya, Permanent Secretary of the Ministry of Natural Resources and Environment (MoNRE) is nominally the lead negotiator for the Environmental Chapter. After the conclusion of the last round of talks in Hawaii in September, Petipong assigned Dr. Supat Wangwongwatana (Deputy-Director General of MoNRE's Pollution Control Department) to be the new lead for the Thai Environmental Group in London. Dr. Supat speaks English fluently and reportedly has had a close relationship with the U.S. EPA for many years. In a phone conversation November 8, however, Dr. Supat seemed uncomfortable discussing his role. He said that Mr. Songsak Saicheva, Minister Counselor at the Thai Embassy in Washington, has effectively been taking the

leading role so far. Dr. Supat admitted that he has not yet seen the text of the bracketed environmental chapter and asked if Econoff he could provide a copy. In response to a request, Dr. Supat said he is on TDY outside of Bangkok and so would be unavailable to meet Econoff before the London talks. Later the same day, a MoNRE staff member called ECON FSN to recommend that for discussions about the FTA, Embassy should go through &appropriate channels<sup>8</sup> ) and talk with the Ministry of Foreign Affairs. We attribute any reticence on the part of MoNRE to a lack of self-confidence.

Thailand,s other FTAs have not included an environmental chapter. MoNRE is not used to dealing with foreigners in formal negotiations. This is new ground for them, so their frequent personnel changes and hesitation in moving forward comes as no surprise.

**¶26. (C)** We did subsequently talk to the Ministry of Foreign Affairs. Mr. Sorasak Samornkraisarakit, First Secretary and member of the Task Force on Environment for the FTA told us that the only item on the Thai agenda for the Environmental Chapter for next round of talks in London is to &discuss the text of the environmental chapter.<sup>8</sup> We observe, however, that in addition to discussions on the text, in previous discussions the Thais were very interested to talk about a mechanism for environmental cooperative activities.

**¶27. (C)** The main sticking point on the text negotiations will be the Thai reluctance to agree to the wording of Article 2 ) &A Party shall not fail to effectively enforce its environmental laws<sup>8</sup> We believe the Thais are uncomfortable with this language because they feel they have a lack of capacity to effectively enforce their own environmental laws. In a nutshell, the Thais lack manpower, training, and financial resources, and in addition, available legal penalties are often insufficient to deter violations. Following are examples from three environmental areas (policing national parks, controlling factory waste-water discharge, and conducting environmental impact assessments) that demonstrate the point.

**¶28. (C)** Example #1: Approximately ten percent of Thailand National Parks, full-time employees work directly for the Ministry of Natural Resources and Environment (although this figure varies greatly from Park to Park). The Ministry does not have the financial resources to hire more employees directly. The result is that most park rangers are local hires who are paid subsistence wages and are trained on the job (in patrolling, the use of a weapon, and the basics of identifying plant and animal species). MoNRE has never developed a training curriculum for its locally hired park rangers, so the quality of training is very much dependent on the local park director. Moreover, legal penalties for poaching and for illegal smuggling of plant and animal products in Thailand is low ) a maximum of USD 1000 fine and one year in prison. (In practice, although arrests are made regularly, no one has ever gone to prison in Thailand for a plant or wildlife trafficking crime, and fines imposed are usually far less than the USD 1000 maximum.)

**¶29. (C)** Example #2: At the launch of the Asian Environmental Compliance and Enforcement Network (AECEN) in Manila in August, the Thai delegation openly voiced his concern that Thailand lacked the necessary numbers of inspectors to ensure compliance with industrial wastewater laws and regulations. In discussions, he expressed interest in other countries, experiences with industry associations that had established mechanisms for self-compliance and self-enforcement as a means to ease the burden on over-strapped government regulatory agencies. He noted that Thailand has an intricate structure of administrative and criminal procedures and penalties for compliance and enforcement, but at the end of the day, penalties are too low to serve as an effective deterrent. The maximum penalty the courts can impose on a factory that fails to comply with waste discharge regulations is USD 5000.

**¶30. (C)** By law, MoNRE,s Office of Natural Resources and Environment Policy and Planning (ONEP) is responsible to administer the Economic Impact Assessment (EIA) process. EIAs are required for any type of construction project (including hotels, highways or roads, mining, multi-family dwellings, hospitals, factories, dams, irrigation works, etc.) in areas adjacent to rivers, lakes, or beaches or in the vicinity on National Parks, as well as any industrial project associated with petrochemicals, oil refineries, natural gas, iron, steel, and cement. ONEP lacks the manpower to perform all these EIAs itself, so it contracts the performance of the EIAs to qualified consulting firms, which are licensed by ONEP (for a period of three to five years). ONEP lacks the financial resources to pay the consulting firms, however, and in practice the firms who conduct the EIAs are paid directly by the business that is proposing to undertake the project. This practice, of course, leads to serious questions about the integrity of the EIA process.

¶31. (C) Given this situation, we think the Thais may be receptive to potential cooperative environmental activities contemplated under an MOU on Environmental Cooperation that may help address the areas ) manpower, training, financial resources, and weak penalties - where they are lacking capacity.

¶32. (C) IPR -- MFA ostensibly decided against sending a team to discuss IPR at the London round after learning that the USG would only have negotiators on hand to discuss enforcement, i.e., no experts were available to discuss Geographical Indications and Traditional Knowledge. The RTG team was to be headed by DG Kanisorn Navanugraha.

¶33. (C) The last round in Hawaii made substantially more progress than previous rounds where very little actual negotiation had taken place. In Hawaii, RTG negotiators agreed in principle to much of USTR's proposed text on copyright, trademark and enforcement. However, Geographical Indications (GI) and Traditional Knowledge (TK) remain controversial issues. The RTG is concerned about GI protection for Thai jasmine rice and Thai silk. On TK, they are looking for provisions to ensure benefit sharing and disclosure of the source of genetic resources and traditional knowledge in production of goods.

¶34. (C) Neither side has yet tabled text on patents which promises to be controversial. RTG negotiators have a different interpretation on TRIPS rules on patent protection and data exclusivity for pharmaceutical products.

¶35. (C) Similar to other chapters, RTG negotiators were unwilling to consider language in the IPR chapter that would require changes to Thai law, even changes consistent with legislation currently under review by the Thai Parliament.

#### TEMPORARY ENTRY

¶36. (C) Although not a chapter in the FTA, we believe this remains the one "offensive" broad issue for Thailand. We have not heard anything on the subject of immigration since the Embassy briefed the Ministry of Commerce Department of Trade Negotiations in August on US immigration law. The Foreign Ministry said that it likewise desired a briefing, but has not followed up. Under the AER Thailand enjoys certain privileges that Singapore did not when it was negotiating an FTA, specifically, the opportunity for Thai nationals to apply for treaty trader/treaty investor visas (so-called E visas). So long as the business in the United States is Thai-owned, this visa category can largely accommodate applications of specialty workers (Thai chefs and spa attendants, for example) who wish to go work in the United States.

¶37. (C) Current law does not, obviously, address any RTG request with respect to H1B visas. We believe much of the Thai insistence on some treatment of H1B visas within the FTA derives from the fact that Singapore won such treatment in its FTA with the U.S. Prime Minister Thaksin is especially sensitive to any sign that the U.S. is prepared to offer Singapore something that is not being offered to Thailand. The personal views of the PM on this issue make it unlikely that the RTG will drop its temporary entry requests anytime soon. We guess that the RTG plans to keep this on the table right up to the conclusion of the talks, and only remove it in exchange for some major U.S. concession (probably a removal of a significant U.S. request to Thailand.) It is a safe bet that the issue will arise in some fashion during the London talks. In a small but hopeful sign that our efforts to deflect this issue may be having some effect, the Ministry of Foreign Affairs has asked to meet with us on December 1 to gain greater understanding of the current visa regime and how Thailand can make better use of existing treaty trader privileges.